THE SUPREME COURT AND THE LEAGUE OF NATIONS*

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DR. JAMES BROWN SCOTT has rendered a noteworthy service to the cause of international justice by publishing, in a convenient form, with a reasoned analysis, the collected decisions of the American Supreme Court upon the controversies that have arisen between the States of the Union.[1] As we all know, a vast amount of useful work has been done in the course of the last hundred years by the various commissions that have been appointed from time to time to arbitrate upon international disputes. The Supreme Court, however, differs from these commissions in that it is the first instance of an interstate tribunal which has been permanently constituted to deal with whatever controversies may present themselves. Arbitration commissions are specially composed *ad hoc* to decide upon the merits of particular disputes, and the judges are for the most part selected directly by the parties to the controversy. The Supreme Court derives its authority, not by delegation from the immediate parties, but from the corporate will of all the federating States of the American Union.

Upon this important question the Covenant of the League of Nations affords us no clear guidance. The language used seems rather to indicate a resort to the arbitral procedure which has already been employed under the Hague conventions. If this be so, then the League will not carry us much farther than we have already gone. In private litigation every one knows the difference between the awards of arbitrators appointed by the parties and the judgments of a court deriving its authority from the State. The distinction is equally applicable to the conduct of international disputes. So long as the parties continue to nominate the judges, the moral authority of the tribunal will be that of arbitrators and nothing more. The stream cannot rise higher than its source.

In the present temper of the world it seems in the highest degree unlikely that the nations will consent to entrust their disputes unreservedly to the decision of judges over whom they have no control. To provide on paper for a permanent court is a comparatively easy matter. But the court will not be an effective instrument for the regular settlement of international disputes unless and until the temper of the civilized world is so changed that men will recognize in the League of Nations a moral authority superior to that of the individual States composing the League.

As at present constituted the League of Nations has many points of resemblance to the short-lived "Confederation," which preceded the "more perfect union" of the present Constitution. In the Confederation the Congress was to be constituted on the principle of "one State one vote," and disputes between the States were to be decided by arbitration commissions appointed *ad hoc*. Each State retained control of its own military forces and reserved the right in an emergency to decide for itself upon questions of peace and war. The weakness of the Confederation lay in the general refusal to recognize in Congress any moral authority superior to that of the individual States. Even after the acceptance of the Constitution the authority of the Federal Government was weakened for many years by the persistence of the doctrine of "State rights," and this weakness was evidenced by the general unwillingness to accept the Supreme Court as the final arbiter of interstate disputes. Although the time was one of many controversies, no final decision was given by the Court in any case between two States until the bill of Rhode Island against Massachusetts was dismissed in 1846.[2] The essential unity of the American nation was ultimately decided, not by the Supreme Court, but by the Civil War.

The case just mentioned is worthy of careful study in the pages of Dr. Scott's work. The dispute was one of long standing concerning the true location of a boundary line, and the bill of Rhode Island was filed in 1833.[3] Massachusetts met the bill with an unqualified denial that the Supreme Court had any jurisdiction over the controversy at all, and threw every obstacle in the way of a final decision upon the merits of the case. The question of jurisdiction was not decided until 1838,[4] and the bill was not finally dismissed until 1846. That such a controversy should have been possible shows clearly how unfamiliar and unwelcome to the American mind at that time was the idea that controversies between the States could be settled by the decision of Federal judges. The development of this idea and the corresponding growth of confidence in the Supreme Court took a very long time.

Of the remaining interstate cases in Dr. Scott's collection only one was pressed to a decision in the period prior to the Civil War. This was a somewhat curious case, in which the State of Kentucky sought a *mandamus* to compel Governor Dennison of Ohio to deliver up a fugitive from justice, whose crime consisted in assisting the escape of a slave from Kentucky into Ohio.[5] The opinion of the Court in refusing the application is an interesting illustration of the attempt to reconcile the conflicting doctrines of Federal and State rights. Taney, C. J., laid down that it was the absolute duty of the Governor, under the Federal Constitution, to deliver up every fugitive, and that he had no right to exercise any discretion as to the merits of particular applications. On the other hand, if the Governor chose to neglect this duty, there was no power either in the Court or in any department of the Federal Government to compel him to perform it. It is greatly to be feared that any tribunal established under the League of Nations will occasionally find itself in the same dilemma.

After the Civil War a remarkable change at once becomes evident. Fourteen boundaries have been definitely fixed by the Court in the period from 1870 to 1918, and final decisions have been given in a number of other suits arising out of various causes. The con-

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[1] Judicial Settlement of Controversies between States of the American Union. 3 volumes. Oxford University Press, New York.

[2] (1846) 4 How. (45 U. S.), 591.

[3] (1833) 7 Pet. (32 U. S.), 651.

[4] (1838) 12 Pet. (37 U. S.), 657 and 755.

[5] (1860) 65 U. S., 66.

ception of the essential unity of the American nation had now taken a firm hold upon the public mind, and this led to an acknowledgment that the National Government had a moral authority superior to that of the individual States and could therefore adjudicate upon disputes between them. From this we may infer that no international tribunal can command a position analogous to that of the American Supreme Court unless and until the public opinion of the civilized world is prepared to acknowledge in the League of Nations a corporate unity, a kind of super-State, wielding a moral authority different from and superior to that of the States composing the League. How far we are still removed from such a conception every man can judge for himself.

Perhaps the greatest difficulty of all lies in the problem of enforcing the decrees of a court which addresses its commands to litigants more powerful than itself. To me this appears as the most interesting topic in Dr. Scott's book, and the most important in its bearing upon the problems of our own day.

Upon this vital question the Constitution is silent, and the Covenant of the League of Nations speaks only with the most timid hesitation. Doubtless the Fathers of the Constitution were wise in their generation. An attempt in 1787 to provide explicitly for the coercion of States by the Federal power would certainly have wrecked any proposals for a "more perfect union." But it was not long before the question came to the front. In 1792 one Chisholm brought an action against the State of Georgia upon a money claim, and in the next year a majority of the Supreme Court admitted his claim.[6] To this Georgia replied in no uncertain voice. She flatly denied the jurisdiction of the Court and threatened the direst penalties against any one who should have the temerity to enforce the judgment. Public opinion in the Union supported her in her resistance, and the Eleventh Amendment was passed to restrain the zeal of the Supreme Court and prevent a repetition of the affront to the dignity of a "sovereign" State.

For many years American opinion undoubtedly shared the view that neither the Supreme Court nor any other department of the National Government had any right to coerce a State. In No. 81 of the *Federalist,* Hamilton had strongly protested that the very idea of coercion was unthinkable. Encouraged by her successful resistance in the Chisholm case, Georgia pursued her own imperious way. She oppressed the unfortunate Cherokee Indians in flagrant disregard of solemn treaties that pledged the honor of the United States, and treated as waste paper the writs by which the Supreme Court sought to stay the proceedings of her officers. The Court was unpopular and was regarded as the enemy of democratic institutions. Guided by Marshall's powerful mind, it had adopted a strongly "Federalist" reading of the Constitution, and President Van Buren was undoubtedly right when he said that if the people could have foreseen its judgments they would never have consented to its erection. President Jackson was carried into office in 1829 on a great wave of popular feeling, which demanded a vigorous reassertion of State rights, and he supported Georgia in her resistance to the decrees of the Supreme Court.

On the other hand, the period since the Civil War is marked by a general willingness, not only to invoke the judgment of the Court, but to submit to its decrees. Only in one case has any real reluctance been shown. In 1915 Virginia obtained a judgment against West Virginia for over twelve million dollars—a debt which had been first created on the formation of the younger State in 1863.[7] For the next four years West Virginia tried every means that the ingenuity of her counsel could suggest to escape compliance with this decree. At one time it seemed as if the question of the enforcement of judgments, so long evaded, must be forced to a decision. In 1918 the Supreme Court went so far as to declare, in the abstract, that the Federal Government had the right to enforce upon a State compliance with decrees of the Federal judiciary.[8] But the ruling was left in the abstract. The ways and means of execution were not defined. In 1919 West Virginia came to a tardy repentance and arranged for the levy of a tax to satisfy the judgment. So the great question remains undetermined, and it is to be hoped that no State will venture again to evade its bounden duty under the Constitution of the United States.

Such are some of the problems that have faced the Supreme Court of the United States in the discharge of its high function as an interstate tribunal. The limits of a review preclude a more detailed examination of these questions, and I hope that I have said enough to send the reader to the pages of Dr. Scott's analysis. It is evident that the difficulties which have confronted the American Supreme Court will be magnified tenfold for any permanent tribunal that is charged with the duty of settling disputes among the nations of the world. Even in their early and most troubled days, the States of the American Union were united by the consciousness of a common origin and purpose and by countless bonds of race, language, and institutions. The international court of the future will have to deal with nations that are separated by every circumstance that can act as a cause of disunion among men.

But to say this is not to utter a cry of despair. The path is difficult, and it would be foolish to ignore the difficulties; but it is not impossible. We must not look for immediate results. It took the best part of a century to establish confidence in the American Supreme Court under conditions infinitely more favorable. Our immediate duty is to convince the world that in all normal cases the judicial settlement of international disputes is the only right method. Of course, we must recognize that there may be exceptions, just as we know that there are times when the most peaceful citizen may have to fight for his life against a burglar. But if we can establish a court upon sound foundations, and if the court can justify itself before men by the wisdom and justice of its decisions, then we may hope that it will, as time goes on, gradually draw an increasing number of cases to its bar, until at last all normal causes of dispute among the nations are settled by peaceful means. Such is the lesson to be read in the history of the Supreme Court of the United States.

[6] (1793) 2 Dall. (2 U. S.), 419.

[7] (1915) 238 U. S., 202, 236.

[8] (1918) 246 U. S., 565.